IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, STATE OF OKLAHOMA, AND STATE OF OHIO Plaintiff-Intervenors, v. SUNOCO, INC., Defendant.	CIVIL ACTION NO. 05-02866 Judge Petrese B. Tucker

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO ENTER THE FOURTH AMENDMENT TO CONSENT DECREE

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INTRODUCTION

The United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), respectfully submits this Memorandum in support of its motion to enter the proposed Fourth Amendment to Consent Decree. The proposed amendment was lodged with the Court on August 17, 2012, and on August 24, 2012, the United States published a notice of the lodging of the proposed amendment in the Federal Register soliciting comment from the public. 77 *Fed. Reg.* 51576 (August 24, 2012). The United States received one comment during the 30-day public comment period from the Environmental Integrity Project and Clean Air Council (together referred to as "Commenter") who seek withdrawal of the amendment because it allegedly does not comply with the letter or purpose of the Clean Air Act ("CAA"). Upon lodging of the amendment, the United States reserved its rights to withhold consent to entry if "public comments disclose facts or considerations" indicating that the proposed amendment is "inappropriate, improper, or inadequate." *See* 28 C.F.R. § 50.7(b). The comment does not point to anything in the agreement itself which violates the law or harms the public. The United States believes that the comment does not show that the amendment is inappropriate, improper, or inadequate. Attached to this memorandum are the proposed Fourth Amendment as Attachment A and the comment as Attachment B. All parties to the Fourth Amendment to Consent Decree have agreed to it and consent to its entry without further notice.[1] The United States requests that

[1] The proposed amendment affects only the refineries located in Marcus Hook and Philadelphia, Pennsylvania. Accordingly, under Paragraph 243 of the Consent Decree, the "Appropriate Plaintiff/Intervenors" for the proposed amendment are the Commonwealth of Pennsylvania and the City of Philadelphia. The consent of the other Plaintiff/Intervenors, Ohio and Oklahoma, or the new owners of the two refineries located in those states is not required for this proposed amendment.

the Court enter the Consent Decree amendment as a final judgment by signing the document at page 14 and entering it as a final judgment.

I. BACKGROUND AND SUMMARY OF THE FOURTH AMENDMENT

A. Background on the Amendments to the Consent Decree

On March 21, 2006 the Court entered a Consent Decree (the "2006 Consent Decree") between the United States, the Commonwealth of Pennsylvania, the States of Ohio and Oklahoma, and the City of Philadelphia as plaintiffs and Sunoco, Inc. which resolved claims concerning Sunoco's petroleum refineries. The claims included alleged violations of the Prevention of Significant Deterioration ("PSD") provisions, the New Source Performance Standards ("NSPS"), the leak detection and repair provisions, and the benzene waste emissions control provisions of the Clean Air Act, ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671. The Decree also resolved claims of Pennsylvania, Ohio, Oklahoma and Philadelphia under the respective State Implementation Plans ("SIPs"). Under that decree, among other things, Sunoco was required to install a Wet Gas Scrubber ("WGS") and Selective Catalytic Reduction ("SCR") on certain of its Fluid Catalytic Cracking Units ("FCCUs") at Philadelphia, Marcus Hook and Toledo and other controls at Tulsa. Sunoco has completed installations of controls at Philadelphia, Tulsa and Toledo as required by the 2006 Consent Decree. Sunoco agreed to install and operate these pollution control technologies to reduce emissions of nitrogen oxides ("NOx"), sulfur dioxide ("SO_2"), and particulate matter ("PM") from refinery process units (principally the FCCUs and process heaters and boilers) by approximately 24,000 tons per year

consistent with best available control technology ("BACT") standards and new source performance standards ("NSPS") emissions limits.[2]

The parties agreed to, and the Court entered, the First Amendment to the 2006 Consent Decree on June 3, 2009, to reflect the sale of the Tulsa refinery. The Third Amendment to the 2006 Consent Decree, reflecting the sale of the Toledo, Ohio refinery, was approved and entered by the Court on August 31, 2011. Also on August 31, 2011, the Court approved and entered the Second Amendment to the 2006 Consent Decree, which extended the time for Sunoco to install WGS and SCR controls at the Marcus Hook Refinery from 2013 to 2015. In exchange, Sunoco agreed to "make up" for the excess emissions of SO_2 and NOx that would result from the delay, plus a "premium" in additional reductions over and above those obtained under the original terms of the Consent Decree. Specifically, Sunoco agreed to implement emission reduction programs to achieve specific SO_2 and NOx limits on the 868 FCCU located at the Philadelphia Refinery by 2014. Controls on the 868 FCCU had not been included in the 2006 Decree.

[2] In addition, Sunoco agreed to: (1) adopt and implement comprehensive, facility-wide, enhanced monitoring and fugitive emission control programs for benzene and other volatile organic compounds; (2) employ significantly improved engineering practices to eliminate excess flaring of hydrogen sulfide; (3) control and monitor carbon monoxide emissions to ensure that Sunoco's FCCU meets applicable NSPS limits; (4) control and monitor flaring devices, heaters and boilers, and sulfur recovery plants to ensure compliance with NSPS 40 C.F.R. Part 60, Subparts A and J; (5) meet NSPS and Prevention of Significant Deterioration/New Source Review ("PSD/NSR") emissions limits for PM at most FCCUs; (6) develop and implement hydrocarbon flaring plans to minimize hydrocarbon flaring events; and (7) install a tail gas unit at the existing sulfur recovery plant and install a second sulfur recovery plant with a tail gas unit at its Toledo refinery. The Consent Decree further required Sunoco to pay $3.0 million in civil penalties and to spend at least $3.5 million on several supplemental environmental projects to be performed in the vicinity of Sunoco's refineries.

On September 6, 2011, Sunoco issued a press release announcing its plans to exit the refining business and that it had begun a process to sell its refineries located in Philadelphia and Marcus Hook. If a buyer could not be found, the company intended to idle the plants by July 2012.[3] On December 1, 2011, Sunoco announced it would immediately shut down the Marcus Hook Refinery.[4] In April 2012, Sunoco announced that it was pursuing a joint venture with another company (what would become PES R&M) to run the Philadelphia Refinery and that it would close that refinery if it were unable to conclude a deal.[5] At about that time, the parties commenced discussions of the technical and legal issues surrounding the effect of any such activities on the Consent Decree, which led to the proposed amendment being lodged with the Court in August, 2012.

B. Summary of the Fourth Amendment to the Consent Decree

The proposed Fourth Amendment to Consent Decree changes limited provisions applicable only to the Philadelphia and Marcus Hook Refineries. As to the Philadelphia Refinery, the amendment would: (1) transfer uncompleted or ongoing Consent Decree responsibilities for the Philadelphia Refinery to PES R&M, such that PES R&M effectively steps into the shoes of Sunoco[6] [Fourth Amendment Para. 1]; (2) set interim SO_2 emission limits and

[3] News Release, Sunoco, Inc., Sunoco to Exit Refining and Conduct Strategic Review of the Company (Sept. 6, 2011). News articles are provided at Attachment C.
[4] Andrew Maykuth, *Sunoco Abruptly Shuts Marcus Hook Refinery*, Phil. Inq., Dec. 2, 2011.
[5] Andrew Maykuth, *Texas Pipeline Firm to Buy Sunoco Inc. for $5.3B*, Phil. Inq. May 1, 2012.
[6] Under the Consent Decree, PES R&M must continue to meet, for example, the ongoing requirements to comply with the emission limits for NOx, SO_2, PM, and carbon monoxide ("CO") [Consent Decree Paras. 12, 15, 16, and 19] and the New Source Performance Standards ("NSPS") for the FCCU regenerators, heaters and boilers, sulfur recovery plants and flaring devices [Consent Decree Paras. 24, 36, 42, and 48]. There are ongoing requirements for the control and management of acid gas flaring and tail gas incidents [Consent Decree Paras. 51 –

extend the time for achieving (but not changing) the final SO_2 emission limits at Philadelphia's 868 FCCU from 2014 to 2016 [Fourth Amendment Para. 4 (Revised 15A)]; (3) briefly extend the schedule for achieving NOx reductions at the Philadelphia Refinery's heaters and boilers and increases the total reductions required to offset temporary operation of Boiler #38 as a backup unit [Fourth Amendment Para. 5 (Revised Paragraph 27)]; (4) establish conditions for using emission reductions achieved by reaching the final SO_2 and NOx emission limits at Philadelphia's 868 FCCU or achieved from the permanent shut down of the Marcus Hook Refinery (to the extent that the Philadelphia and Marcus Hook Refineries are determined to be a single source) as credits or offsets in any PSD, major non-attainment or minor NSR permits for new projects constructed at the Philadelphia Refinery and require that the new or modified units meet specified emissions control levels [Fourth Amendment Para. 6 (New Paragraph 99A)]; and (5) require PES R&M to install, operate, and maintain a fenceline emissions monitoring system at the Philadelphia Refinery and provide data from that system to the public [Fourth Amendment Para. 8 (New Paragraph 113A and New Appendix J)]. These terms are described in more detail in section III. below.

In addition to the adjustment of obligations at the Philadelphia Refinery, the proposed amendment would modify the Consent Decree as it affects the Marcus Hook Refinery. For business reasons, Sunoco has ceased operations there and intends to permanently shut-down this refinery. However, there are still as-yet uncompleted requirements for the installation of certain

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63]. There are also ongoing requirements related to the monitoring and management of benzene waste streams [Consent Decree Para. 65 - 77]. The Consent Decree also continues to impose ongoing auditing and monitoring requirements through the enhanced leak detection and repair ("LDAR") program [Consent Decree Paras. 80 and 84].

air pollution controls and other obligations at the Marcus Hook location. Paragraph 244 of the 2006 Consent Decree addresses this contingency by providing that the "permanent shutdown of a Refinery shall be deemed to satisfy all requirements applicable to that Refinery." Accordingly, Paragraph 2 of the proposed amendment provides for the permanent shut-down of the Marcus Hook Refinery by August 31, 2012, requiring (i) the cessation of crude refining operations, and (ii) the surrender of all air permits to operate as a refinery. In this way, Sunoco fulfills its Consent Decree obligations by eliminating all SO_2, NOx, and PM emissions from the crude refining operations at the Marcus Hook Refinery by 2012 instead of 2015 as previously required.

The proposed Consent Decree amendment resulted from several months of good-faith, arms-length negotiation among the parties. The United States was represented by experienced counsel at the Department of Justice and U.S. EPA who worked closely with technical and legal staff from EPA's Regional office in Philadelphia, where the refineries are located, and EPA's Washington, D.C.-based Office of Civil Enforcement, as well as representatives of the Pennsylvania Department of Environmental Protection ("PADEP") and the City of Philadelphia's Law Department and Air Management Service ("AMS"). Sunoco and PES R&M also were represented by experienced in-house and outside environmental counsel with support from their technical staffs. The proposed Consent Decree amendment reflects the parties' careful and informed assessment of the matters covered by the amendment.

C. Statutory and Regulatory Framework

The Clean Air Act established a regulatory scheme designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1). Section 109 of

the Act, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for certain air pollutants. The primary NAAQS are to be adequate to protect the public health, and the secondary NAAQS are to be adequate to protect the public welfare, from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA for approval a State Implementation Plan ("SIP") that provides for the attainment and maintenance of the NAAQS. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. These designations have been approved by EPA and are located at 40 C.F.R. Part 81. An area that meets the NAAQS for a particular pollutant is classified as an "attainment" area; one that does not is classified as a "non-attainment" area.

Part C of Title I of the Act, 42 U.S.C. §§ 7470-7479, sets forth requirements for the prevention of significant deterioration ("PSD") of air quality in those areas designated as attaining the NAAQS standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision-making process. These provisions are referred to herein as the "PSD program." Section 165(a) of the Act, 42 U.S.C. § 7475(a), prohibits the construction and

subsequent operation of a major emitting facility in an area designated as attainment unless a PSD permit has been issued. Section 169(1) of the Act, 42 U.S.C. § 7479(1), includes within the definition of "major emitting facility" a petroleum refinery with the potential to emit 100 tons per year (tpy) or more of any air pollutant. As set forth in EPA's implementing regulations at 40 C.F.R. § 52.21(k), the PSD program generally requires a person who wishes to construct or modify a major emitting facility in an attainment area to demonstrate, before construction commences, that construction of the facility will not cause or contribute to air pollution in violation of any ambient air quality standard or any specified incremental amount.

As set forth at 40 C.F.R. § 52.21(i), any major emitting source in an attainment area that intends to construct a major modification must first obtain a PSD permit. "Major modification" is defined at 40 C.F.R. § 52.21(b)(2)(i) as meaning any physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase of any criteria pollutant subject to regulation under the Act. "Significant" is defined at 40 C.F.R. § 52.21(b)(23)(i) in reference to a net emissions increase or the potential of a source to emit a criteria pollutant, at a rate of emission that would equal or exceed a specific level, e.g.: for ozone, 40 tons per year of volatile organic compounds (VOCs); for carbon monoxide (CO), 100 tons per year; for NOx, 40 tons per year; for SO_2, 40 tons per year, (hereinafter "criteria pollutants"). As set forth at 40 C.F.R. § 52.21(j), a new major stationary source or a major modification in an attainment area shall install and operate best available control technology ("BACT") for each pollutant subject to regulation under the Act that it would have the potential to emit in significant quantities.

Part D of Title I of the Act, 42 U.S.C. §§ 7501-7515, sets forth the requirements for those geographic areas that have not attained a particular NAAQS. One such requirement is for states to have a preconstruction permitting program known as nonattainment New Source Review ("NSR"). Section 173 of the Act, 42 U.S.C. § 7503, requires that in order to obtain such a permit the source must, among other things: (a) obtain federally enforceable emission offsets at least as great as the new source's emissions; (b) comply with the lowest achievable emission rate ("LAER") as defined in Section 171(3) of the Act, 42 U.S.C. § 7501(3); and (c) analyze alternative sites, sizes, production processes, and environmental control techniques for the proposed source and demonstrate that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

As set forth in 40 C.F.R. § 52.24, no major stationary source shall be constructed or modified in any non-attainment area as designated in 40 C.F.R. Part 81, Subpart C to which any SIP applies, if the emissions from such source will cause or contribute to concentrations of any pollutant for which a NAAQS is exceeded in such area, unless, as of the time of application for a permit for such construction, such plan meets the requirements of Part D, Title I, of the Act. A state may comply with Sections 172 and 173 of the Act by having its own non-attainment new source review regulations approved as part of its SIP by EPA, which must be at least as stringent as those set forth at 40 C.F.R. § 51.165.

II. STANDARD OF REVIEW FOR ENTRY OF CONSENT DECREES

"The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984) (quoting

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied sub nom. Byrd v. Civil Serv. Comm'n, 459 U.S. 1217 (1983)); accord United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 351 (6th Cir. 1986); United States v. Hooker Chem. & Plastics Corp., 776 F.2d 410, 411 (2nd Cir. 1985); United States v. Union Elec. Co., 132 F.3d 422, 430 (8th Cir. 1997). Courts, however, exercise this discretion within the framework of certain policy principles applicable to the settlement process.

A district court reviewing a consent decree must determine whether the proposed settlement fairly and reasonably resolves the controversy in a manner consistent with the public interest and applicable law. See United States v. Oregon, 913 F.2d 576, 580–81 (9th Cir. 1990); accord United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990) ("The relevant standard [is] . . . whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute."). "Unless a Consent Decree is unfair, inadequate, or unreasonable, it ought to be approved." Randolph, 736 F.2d at 529. In reviewing a proposed consent decree, the reviewing court is to ascertain whether the decree is fair, adequate, and reasonable, Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977), as well as consistent with the objectives of the statute under which the action was brought, United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (Rubin, J., concurring). "The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy . . . ." *Id.* at 441 n.13. These standards of review should be the same for an amendment to an already approved settlement.

The reviewing court's discretion should be exercised with deference to the "strong public policy in favor of settlements, particularly in very complex and technical regulatory contexts."

United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000). Voluntary settlements of disputes are favored by the Courts. See also, Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982); accord, United States v. Nicolet, Inc., No. 85-3060, 1989 WL 95555, at *2 (E.D. Pa. Aug. 15, 1989); Hooker Chemical, 776 F.2d at 411 (noting "well-established policy of encouraging settlements").

The reviewing court should accord deference to the judgment of the United States and its agencies in settling a matter. The Supreme Court, in Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961), emphasized the importance of deference to the United States regarding settlement: "sound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . Consent Decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." The Circuit Courts have echoed this principle of deference to the United States. A court reviewing a settlement "should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." Randolph, 736 F.2d at 529 (citing Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977), Officers for Justice, 688 F.2d at 625); see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (concluding that the balancing of competing interests affected by proposed Consent Decree "must be left, in the first instance, to the direction of the Attorney General"). The First Circuit has directed courts in these circumstances to "refrain from second-guessing the Executive Branch." Cannons, 899 F.2d at 84. Judicial presumption in favor of voluntary settlement is "particularly strong where a Consent Decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the

environmental field." United States v. Akzo Coatings of Am. Inc., 949 F.2d 1409, 1436 (6th Cir. 1991). These negotiations often involve a "crew of sophisticated players, with sharply conflicting interests . . . ." Cannons, 899 F.2d at 84. Given that, the court "must look at the big picture, leaving interstitial details largely to the agency's informed judgment." Cannons, 899 F.2d at 94. In sum, while the court should not merely give its "rubberstamp approval", United States v. BP Explorations and Oil Co. 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001) it should consider a consent decree against the strong public policy encouraging voluntary settlement, a policy that has "particular force" where the decree has been negotiated on behalf of an expert agency like EPA. Cannons, 899 F.2d at 84.

Thus, a reviewing court is not required to make the same in-depth analysis of a proposed settlement that it would be required to make in order to enter a judgment on the merits after trial:

> The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.

Citizens for a Better Environ. v. Gorsuch 718 F.2d 1117, 1126 (D.C. Cir. 1983); accord Officers for Justice, 688 F.2d at 625. The relevant standard "is not whether the settlement is one which the court itself might have fashioned, or considers as ideal . . . ." United States v. Kramer, 19 F. Supp. 2d 273, 280 (D.N.J. 1998) (quoting Cannons Eng'g Corp., 899 F.2d at 84); accord United States v. Southeastern Pa. Transp. Auth., 235 F.3d 817, 823 (3d. Cir. 2000) ("A court should approve a proposed Consent Decree if it is fair, reasonable, and consistent with CERCLA's goals."). Thus, the court cannot "substitute its judgment for that of the parties nor conduct the type of detailed investigation required if the parties were actually trying the case." BP

Exploration, 167 F. Supp. 2d at 1050. Nor should the court judge the proposed settlement "against a hypothetical or speculative measure of what might have been achieved by the negotiators." Officers for Justice, 688 F.2d at 625 (citations omitted). Ultimately, "[t]he court need only be satisfied that the decree represents a 'reasonable factual and legal determination.'" Oregon, 913 F.2d at 581 (quoting United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (Rubin, J., concurring)).

Ensuring that the settlement is in the public interest is but one factor to be considered by the Court and does not alter the fundamental reasonableness standard or the policy of deference to the settling agency. Randolph, 736 F.2d at 529 (holding that the district court applied "too strict a standard" when it "closely scrutinize[d] the proposed decree to see if it was in the public's best interest"). Even where a Consent Decree affects the public interest or third parties, "the court need not require that the decree be 'in the public's best interest' if it is otherwise reasonable." Oregon, 913 F.2d at 581 (quoting Randolph, 736 F.2d at 529 (emphasis in original)). Nor must a consent decree "impose all the obligations authorized by law." Id.

The court's role in considering a proposed decree is a limited one: "The court may either approve or disapprove the settlement; it may not rewrite it." Harris v. Pernsley, 654 F. Supp. 1042, 1049 (E.D. Pa.), aff'd, 820 F.2d 592 (3d Cir. 1987); accord Jones & Laughlin Steel, 804 F.2d at 351 (stating that a court does not have the power to modify a Consent Decree; it may only accept or reject the terms to which the parties have agreed). Thus, the question to be resolved in reviewing the settlement, and the degree of scrutiny to be applied, are distinct from the merits of the underlying action.

In sum, this Court's role in reviewing the proposed amendment to the Consent Decree is limited to approval or denial, based on an evaluation of the fairness and reasonableness of the settlement and its concordance with the applicable law. The Court must conduct this evaluation in the context of the strong public policy supporting settlement and bearing in mind the substantial deference due to EPA's and DOJ's interpretations of applicable environmental laws and regulations as well as to EPA's engineering and scientific determinations. See, e.g., Sunoco, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984); American Paper Inst. v. U.S. EPA, 660 F.2d 954, 963 (4th Cir. 1981).

III. THE CONSENT DECREE IS FAIR, REASONABLE, AND CONSISTENT WITH THE PUBLIC INTEREST AND THE GOALS OF THE CLEAN AIR ACT

The proposed Fourth Amendment to Consent Decree satisfies the standard for approval of a settlement. The amendment is fair, reasonable, and in accord with the objectives of the Clean Air Act because it resulted from complex, arms-length negotiations; it fairly reflects the changing circumstances at the refineries while preserving key environmental protections; and it is a reasonable compromise which is faithful to the goals of the statute and in the public interest. Accordingly, the amendment should be entered as a final order of the Court.

The comment received contends that the proposed amendment "violates the clear requirements of the Clean Air Act," and that it should be withdrawn.[7] Specifically, the Commenter argues the proposed amendment does not meet the standard for consent decrees because it (1) illegally treats the Philadelphia and Marcus Hook Refineries as a single facility

[7] Letter from Sparsh Khandeshi, Attorney, Environmental Integrity Project, to Ignacia S. Moreno, Assistant Attorney General, U.S. Dept. of Justice, Environmental and Natural Resources Division 1 (Sep. 23, 2012).

thereby authorizing emission increases, (2) will harm air quality in the Philadelphia area by allowing the Philadelphia Refinery to avoid NSR requirements and not require the use of BACT and LAER technologies, and (3) was not negotiated at arm's-length.[8] As discussed below, these assertions are unfounded. The proposed agreement does not violate any statutory requirements and is protective of the environment.

A. The Consent Decree is Procedurally and Substantively Fair.

1. Procedural Fairness

This settlement is the result of a fair process. A settlement is procedurally fair if the negotiations that created it were non-collusive, open, and at arms-length. See BP Exploration, 167 F. Supp. 2d at 1051 (citing Cannons, 899 F.2d at 93). The settlement embodied in the proposed Decree is the product of extended, arms-length negotiations; it is not a case where the alleged violator "dictated the settlement terms and that EPA simply accepted whatever [they] wanted." United States v. Pac. Gas & Elec., 776 F. Supp. 2d 1007, 1025 (N.D. Cal. 2011). The amended decree preserves nearly all of the provisions of the previous iteration of the Consent Decree. The negotiations that led to the proposed amendments to the Consent Decree involved many discussions concerning both legal and technical issues, including exchanges of information and data. A considerable amount of time and resources was invested by all sides in order to resolve issues and come to a settlement which indicates an adversarial and non-collusive process. United States v. Chevron U.S.A., Inc., 380 F. Supp. 2d 1104, 1112 (N.D. Cal. 2005).

The Commenter questions whether the proposed amendment was a result of an arms-length negotiation, claiming that there is "some" evidence indicating that it was not. Comment

[8] Id. at 6–10.

at 10. The Commenter cites only to newspaper articles which the Commenter asserts "report[ed] that the Obama Administration renegotiated Clean Air Act requirements to convince the Carlyle group to purchase a majority stake in the refinery to keep it running." Id. Without any other evidence, the Commenter argues that the proposed amendment was not fair because the interest of the "Obama administration" in keeping the refinery open suggests that negotiations over the amendment were not conducted at arms-length and then simply asserts that the proposed amendment overrides Clean Air Act requirements. Id. at 10.

There is no merit to the Commenter's conclusory assertions that the proposed amendment was not the result of fair, good faith, and arms length dealings. The commenter provides no explanation for how the interest of the "administration", as well as state and local officials, in the continued operation of the refinery evidences any unfairness in the process. If anything, the interest of the executive branch, along with the various State and City officials, suggests a heightened scrutiny and that the agreement was the result of "adversarial vigor", United States v. Dist. of Columbia, 933 F. Supp. 42, 48 (D. D.C. 1996). The amendment is the product of the efforts of a variety of affected parties, all of whom are represented by experienced lawyers which by itself suggests fairness. Cannons, 899 F.2d at 84. Thus there is nothing to suggest that the negotiation process can be considered collusive.

2. Substantive Fairness

In addition to being the result of a procedurally fair process, the settlement's terms are substantively fair. To determine whether a proposed settlement is substantively fair, courts look to factors such as the strength of the plaintiff's case versus the amount of the settlement offer, the

likely complexity, length and expense of litigation, the amount of opposition to the settlement, the opinion of competent counsel, the stage of the proceeding, and the amount of discovery undertaken. Great Neck Capital Appreciation Inv. P'ship v. PricewaterhouseCoopers, 212 F.R.D. 400, 409 (E.D. Wis. 2002) (citing E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1980)); BP Exploration, 167 F. Supp. 2d at 1051. Because these concepts do not lend themselves to "verifiable precision [,] [i]n environmental cases, EPA's expertise must be given 'the benefit of the doubt when weighing substantive fairness.'" Comunidades Unidas, 204 F.3d at 281 (quoting Cannons, 899 F.2d at 88). These terms also are not easily quantified in this instance because this is a modest amendment of an existing consent decree.

The proposed Fourth Amendment is substantively fair because it preserves the vast majority of all requirements of the 2006 Consent Decree and the prior amendments already entered by this Court but also fairly addresses the changed circumstances at the Philadelphia and Marcus Hook Refineries.[9] The proposed amendment does not renegotiate or override any Clean Air Act requirements. The few modifications to the Consent Decree result from DOJ's, EPA's, PADEP's and AMS' assessment of how to adapt to the change in ownership of the Philadelphia Refinery and the closure of the Marcus Hook Refinery while effecting the environmental requirements and the public protections in the original decree. In short, it reflects the sound judgment of the environmental agencies tasked with protecting the environment and enforcing the environmental laws.

[9] For instance, the emission limits for PM and CO and the NSPS standards for the FCCU regenerators, the sulfur recovery plants and the flaring devices identified in FN 6 above are not changed. The Consent Decree also established enhanced monitoring, investigative, management and control requirements to address issues at the refineries related to flaring incidents, benzene wastes and equipment leaks Consent Decree Paras. 48 – 92]. None of these requirements have been changed by the Fourth Amendment.

Specifically, the proposed amendment requires PES R&M to step into Sunoco's shoes in order to implement the ongoing and future requirements of the consent decree which includes achieving stringent emission limits and implementing other enhancements that will reduce NOx and SO_2 emissions in the Philadelphia region. In addition, the agreement requires PES R&M to install a fenceline monitoring program to monitor emissions so that the public and nearby neighborhoods can be kept informed about emissions levels from the Philadelphia Refinery. At the same time, the agreement enables the Philadelphia Refinery to continue operating. That outcome conforms to "Congress' belie[f] that [the Clean Air Act's] PSD provisions should balance the values of clean air, on the one hand, and economic development and productivity, on the other . . . ." Natural Res. Def. Council v. U.S. E.P.A., 937 F.2d 641, 645–46 (D.C. Cir. 1991).

The allegation that the government renegotiated Clean Air Act requirements is untrue. As explained above, the parties identified and addressed legal and technical issues to ensure future compliance with all Clean Air Act requirements at the Philadelphia Refinery. The Court has previously determined that the Consent Decree and the prior amendments were substantively fair and, because the amendment maintains all prior commitments, there is nothing substantively unfair about the proposed amendment. As explained below, ultimately, it is clear that on its face, the proposed amendment does not relieve PES R&M of any statutory or regulatory requirements.

At its heart, the Commenter's major objection is that "[t]he [p]roposed [a]mendment [w]ould [i]mpermissibly [a]llow the Philadelphia and Marcus Hook Refineries to be [p]ermitted as a [s]ingle '[f]acility'" and that this aggregation "violates the Clean Air Act and EPA's own regulations and policies." Comment at 5-6. However, the proposed amendment does not make any such single source determination. There is nothing in the proposed amendment itself that

determines that the Marcus Hook and Philadelphia Refineries are a single source for air permitting purposes. It only recognizes that the permitting authorities - PADEP and AMS - could make such a determination, and it imposes certain additional conditions that would not otherwise be required under federal, state, or local law should PADEP and AMS determine that the two refineries meet the criteria for being permitted as a "single source."[10]

A single source determination would have to be made through a permitting action by PADEP and/or AMS.[11] Thus, the appropriate forum in which to challenge PADEP's permitting decision is through an appeals process provided by Pennsylvania law for permitting actions. *See* Section 10.2 of Pennsylvania's Air Pollution Control Act, 35 Pa. Cons. Stat. § 4010.2 (appeals of PADEP permitting actions are heard by the Pennsylvania Environmental Hearing Board ("EHB")).

The proposed amendment ensures that the permitting process for certain new or modified units at the Philadelphia Refinery will require the imposition of stringent BACT, best available technology ("BAT") and LAER controls, even where the later requirements would not otherwise apply. As set forth in Paragraph 6 of the proposed amendment, new Paragraph 99A.b. of the Consent Decree would impose specific and clear limitations on the effect of such a determination which are more stringent than what would ordinarily be the case under federal, state, or local law. That paragraph predetermines limits on the number of tons of pollutants which may be

[10] PADEP is the air permitting agency for the Marcus Hook Refinery and AMS is the air permitting agency for the Philadelphia Refinery.

[11] The Commenter correctly notes that, after the date on which the proposed amendment was lodged, PADEP, exercising its permitting authority, made a single source determination regarding the Marcus Hook and Philadelphia Refineries by means of an administrative permit amendment. Comment at 2. This decision by PADEP, independent of the proposed amendment, is the government action to which the Commenter actually objects.

used at the Philadelphia Refinery as credits in PSD or NSR permit proceedings; requires that the units at which credits are used be subject to a federally enforceable permit that imposes strict pollutant emission limits and/or controls; and limits the application of emission reduction credits to the Philadelphia Refinery. Paragraph 99A. b. states:

> In the event that PADEP and AMS determine that the Marcus Hook and Philadelphia Refineries are considered one "facility" under Pa. Code Title 25 § 121.1, and a "stationary source" under 40 C.F.R. § 52.21(b)(5), and such determination is reflected in a final agency action by PADEP or AMS relative to the permit issued under Title V, then the Philadelphia Refinery Property may use up to 111.37 tons per year of NOx, 128.42 tons per year of SO_2, 317.94 tons per year of $PM_{2.5}$, 317.94 tons per year of PM_{10}, 365.60 tons per year of CO, 2.21 tons per year of VOCs, 922,286.83 tons per year of Greenhouse Gases ("GHGs," as defined in 40 C.F.R. § 70.12(a)(1)) and 56.07 tons per year of sulfuric acid mist ("$S0_3$") from the permanent shut-down of the Marcus Hook Refinery emission units and in the amounts specified in Appendix 2 to the Fourth Amendment, as credits in any PSD, major non-attainment and/or minor NSR permit(s) or permit proceeding(s) no sooner than the Date of Entry of the Fourth Amendment to Consent Decree, provided that (a) such credits are generated while the Philadelphia and Marcus Hook refineries constitute one stationary source under the authorities listed above, (b) the emissions units at which credits are being used have a federally enforceable permit that reflects the requirements of Paragraph 99A.a.i.-vii, as applicable and (c) the credits are "contemporaneous" with the increases from the project covered by the permit.

The Commenter also asserts that the single source determination made by PADEP is contrary to the CAA and applicable regulations and policies of the Environmental Protection Agency ("EPA" or "Agency"), arguing that the Philadelphia and Marcus Hook Refineries are not one facility because they are not under common control and are not adjacent to each other. As previously noted, the proposed amendment does not make this single source determination. Instead, it imposes certain restrictions on the use of emission reductions credits should the state or local permitting agency make such a determination. Nevertheless, the United States notes that it does not view the Commenter's assertions as demonstrating that a single source determination in this instance would necessarily be inappropriate or foreclosed under the CAA and EPA's

regulations and policies. The Agency has repeatedly stated that single source determinations are fact-specific decisions to be made by the permitting authority on a case-by-case basis. *See* 45 *Fed. Reg.* 52676, 52695 (August 7, 1980) (Preamble to the Final Rule Adopting the New Source Review Definition of "Source") (noting that "only through case-by-case determinations" could the Agency answer questions as to "how far apart activities must be in order to be treated separately").

We reiterate that a forum for developing a proper record to review a single source determination for the Marcus Hook and Philadelphia Refineries exists and that is the Pennsylvania EHB, whose decisions are appealable to the Pennsylvania Commonwealth Court. *See* 42 Pa. Cons. Stat. § 763.

The existing Consent Decree and its amendments already provide for a reduction in air emissions in the Philadelphia area. The Fourth Amendment's terms continue these enforceable environmental protections, and continue to provide tangible benefits to the health and welfare of the residents in the Philadelphia region. Recognizing the uncertainties inherent in pursuing claims in litigation or renegotiating an entire consent decree, the relief achieved through this settlement is substantively fair. The proposed amendment does this while avoiding complex and resource-intensive litigation or negotiations and preserving hundreds of jobs. As explained in more detail below, the combined impact of the 2006 Consent Decree, its prior amendments, and the proposed Fourth Amendment is an advancement of the Clean Air Act goals. Thus, the amendment is substantively fair.

B. The Decree Is Reasonable, Adequate and Consistent with the Goals of the Clean Air Act.

In determining whether the Decree is "reasonable, adequate, and consistent with the goals of the governing statute," courts have evaluated the following factors: "(1) the nature and extent of potential hazards; (2) the availability and likelihood of alternatives to the Consent Decree, (3) whether the Decree is technically adequate to accomplish the goal of cleaning the environment; (4) the extent to which the Consent Decree furthers the goals of the statutes which form the basis of the litigation; (5) the extent to which the Court's approval of the Consent Decree is in the public interest; and (6) whether the Consent Decree reflects the relative strengths and weakness of the Government's case against the Defendants." BP Exploration, 167 F. Supp. 2d at 1053 (citing Akzo, 949 F.2d at 1436; Cannons, 899 F.2d at 89–90).

Though not all of these factors are appropriate for discussion here, they all militate in favor of approving the Fourth Amendment, which should be considered reasonable and adequate for many of the same reasons discussed above with respect to substantive fairness. On balance, the United States and the Plaintiff-Intervenors believe the proposed amendment reasonably and adequately addresses Clean Air Act requirements and is protective of the public. Ultimately, the Commenter complains that the amendment is inappropriate because it will lead to additional emissions of pollutants. There is no evidence to support the allegation of increased emissions. Further, the implication that the governments abandoned their environmental responsibilities is unfair and untrue.

1. The Fourth Amendment benefits the environment and furthers the goals of the Clean Air Act.

Under the 2006 Consent Decree and the Second Amendment, Sunoco is bound by specific terms ensuring emissions reductions of pollutants such as NOx, SO_2, and benzene. The Fourth Amendment continues that relief by instituting specific interim limits, providing for the closure and surrender of permits at Marcus Hook, imposing the relief obligations at the Philadelphia Refinery on PES R&M, and requiring the installation of a fenceline emissions monitoring system. Contrary to the Commenters' claim that the agreement will harm air quality by allowing the Philadelphia Refinery to avoid NSR permitting requirements and "significantly increase emissions[,]"[12] the agreement will continue to require the reduction of emissions that were specified in the 2006 Consent Decree and will ensure that future projects at the Philadelphia Refinery will meet BAT, BACT, and LAER requirements.

Pursuant to Paragraph 1 of the proposed amendment, PES R&M will be substituted as the current owner/operator of the Philadelphia Refinery. As a party to the Consent Decree, it will assume the liabilities and obligations imposed by, and be bound by the terms and conditions of, the Consent Decree as it applies to the Philadelphia Refinery, and to be subject to all Consent Decree requirements applicable to that refinery. In addition, Paragraph 3 of the proposed amendment would discharge Sunoco from any future obligations at the Philadelphia Refinery.

Paragraph 2 of the proposed amendment would provide for the permanent shut-down of the Marcus Hook Refinery by requiring (i) the cessation of crude refining operations, and (ii) the surrender all air permits to operate as a refinery. The permanent shut down of an emission unit

[12] Id. at 9.

at the Marcus Hook refinery and the surrender of its permit fulfills Sunoco's Consent Decree obligations applicable to that emission unit. (See also Paragraph 247 of the Consent Decree.)

The proposed amendment continues to require compliance with the SO_2 emission limits at the 868 fluidized catalytic cracking unit ("FCCUs") and NOx reductions at the refinery's heaters and boilers. These two provisions are described in further detail below:

FCCU Compliance Schedule. The proposed amendment would revise the compliance schedule for the reduction of SO_2 emissions from the "868 FCCU" at the Philadelphia Refinery. The Second Amendment to the Consent Decree required Sunoco to undertake a period in which it would operate the 868 FCCU in a way that minimizes emissions and to test the use of pollutant-reducing catalyst additives, with the objective of achieving an SO_2 emission limit of 25 parts per million ("ppm") on a 365-day rolling average basis, and 50 ppm on a 7-day rolling average basis. The Second Amendment also provided that in the event that Sunoco could not reliably achieve this 25ppm/50ppm SO_2 limit, Sunoco could propose an alternate (higher) emission limit for the 868 FCCU, provided that it would also propose implementation of additional measures to reduce SO_2 from other units, to achieve an overall equivalent level of SO_2 reductions.

Paragraph 4 of the proposed amendment would establish an immediately effective "interim" SO_2 emission limit of 125 ppm on a 365-day rolling average basis (currently there is no such "interim" emission limit under the Consent Decree), and would require compliance with the originally agreed-to 25ppm/50ppm SO_2 emission limit as the "final" limit by no later than December 31, 2016. PES R&M, as the new owner/operator of the refinery, is to use this interim period to work out any technical difficulties needed to meet the final limit.

The Second Amendment to the Consent Decree contained an emission limit for SO_2 for the Philadelphia Refinery's 868 FCCU. The SO_2 emission limit was established as a compensation for an expected increase in emissions that would have resulted from a delay in installation of controls at the Marcus Hook Refinery; however, as a result of the permanent shut-down of crude refining operations at that refinery, those increased emissions contemplated by the Second Amendment to the Consent Decree will not materialize. Therefore, the schedule for the final SO_2 emission limit at the Philadelphia Refinery's 868 FCCU is modified in the proposed Fourth Amendment in recognition of the greater overall level in emissions reductions in the Philadelphia area resulting from the cessation of crude refining at the Marcus Hook Refinery.

Heater and Boiler NOx Reductions. All four refineries covered by the 2006 Consent Decree (Tulsa, Toledo, Philadelphia and Marcus Hook) were required to achieve a system-wide reduction in NOx emissions of 2,189 tons per year ("tpy") from refinery heaters and boilers by no later than eight years from the date of entry of the Consent Decree (or by March 21, 2014). Following the sale of the Tulsa and Toledo refineries, the Third Amendment established that the share of these required NOx reductions that was to be achieved by the remaining Sunoco-owned refineries in Marcus Hook and Philadelphia was 1,748.2 tpy. To meet this obligation, Sunoco had permanently shut-down the boiler designated "Boiler #38" at the Philadelphia Refinery.

Paragraph 5 of the proposed amendment would allow Boiler #38 to be operated on a limited basis, as a back-up unit when other refinery boilers are down for maintenance during 2013 and 2014, and would set a NOx emissions limit of no more than 24.9 tpy. To offset this increase in NOx emissions, the total amount of NOx that is required to be reduced from Philadelphia Refinery heaters and boilers is increased to 1,773.5 tpy, to be achieved by no later

than September 30, 2014. Consequently, the adjusted schedule and greater level of required NOx reductions are "emissions neutral" – that is, the increase in NOx emissions from the operation of Boiler #38 is offset by the requirement for a greater overall level of NOx reductions than currently required under the Consent Decree.

Thus, these modifications achieve at least as much emissions reductions as the existing requirements. It is the technical and legal judgment of the United States, PADEP, and AMS, that the relief afforded by this settlement continues to provide the same measurable and enforceable progress toward the Clean Air Act goals of enhancing air quality and promoting public health and welfare.

2. The Fourth Amendment is protective of the public interest.

When evaluating whether a Consent Decree is in the public interest, "[t]he court should bear in mind the flexibility of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (internal quotations omitted); Oregon, 913 F.2d at 581 ("[T]he court need not require that the decree be 'in the public's best interest' if it is otherwise reasonable.") (quoting Randolph, 736 F.2d at 529 (emphasis in original)). As explained, the Consent Decree, along with the amendments, provides real benefits, through emissions reductions, to the citizens in the vicinity of the Philadelphia and Marcus Hook Refineries.

The Commenter complains that the proposed amendment impermissibly allows the Philadelphia and Marcus Hook Refineries to be permitted as a single "facility," thereby avoiding

New Source Review requirements and harming air quality. This argument is premised on a misunderstanding of the provisions contained in Paragraph 6 of the proposed amendment and the new Paragraph 99A of the Consent Decree. The proposed amendment does not itself make this "single facility" or "single source" determination. New Paragraph 99A of the proposed amendment would put provisions into place that would both cap the amount of available credits available for use in NSR permitting,[13] as well as to ensure the application of specified controls on any such units that rely on such credits if PADEP and AMS make a single source determination. It should be noted that, even if new Paragraph 99A were omitted for the Consent Decree, PADEP and AMS could make a single source determination but without the additional restrictions imposed by that paragraph.

The Commenter contends that the proposed amendment would "negatively impact air quality by allowing the Philadelphia Refinery to significantly increase emissions without complying with New Source Review." Comment at 9. The Commenter's attributes the concern to the possible effect of the single source determination.[14] However, the proposed amendment's provisions imposing additional requirements on Sunoco and PES R&M applicable to new projects on or at the Philadelphia Refinery Property directly address the Commenter's concern about the potential impact on air quality that might result from a single source determination.[15]

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[13] The reference to NSR permitting here is used in its generic sense to include permits issued under either the PSD or nonattainment NSR programs.

[14] "The Consent Decree undermines these goals by allowing the Philadelphia Refinery to increase emissions beyond the New Source significance thresholds by discounting pollution increases with reductions realized at a separate facility 17 miles away." *Id.*

[15] Under applicable CAA regulations, as part of the permitting of newly constructed or modified emission units that will cause a significant increase in emissions, facilities must identify all contemporaneous emission increases and decreases that have occurred at the facility over the previous five year period. The contemporeous decreases may be sufficient to offset the

a. New Source Review and Use of Emission Credits at the Philadelphia Refinery

The Consent Decree, in Paragraphs 97 through 99, already contains certain additional restrictions, over and above those contained in CAA permitting requirements, governing the use of Consent Decree-required emission reductions as netting credits when applied to refinery units. These paragraphs generally prohibit the use of netting credits. However, in certain, limited circumstances, the Consent Decree allows emission credits to be used but, in such circumstances, also mandates a specified level of emission controls for any refinery units where credits are used. In other words, even where the Consent Decree allows the use of credits to "net out" of major NSR permitting procedures, it does not allow the refinery to also "net out" of the pollution controls that would be required for major modifications.

Paragraphs 3 and 6 of the proposed amendment would extend these existing restrictions on the use on netting credits more broadly, to apply to any new projects undertaken at or on the "Philadelphia Refinery Property" (as defined by Paragraph 3 and Appendix 1 of the proposed amendment) that rely on credits generated by the shut down of refinery operations at Marcus Hook. Under the proposed amendment, not only do the restrictions on the use of credits continue to apply to refinery-related emission units, those restrictions are extended to apply to the construction or modification of new or modified non-refinery units within the borders of the Philadelphia Refinery Property as well.

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increases in emissions from new or modified units when they are generated by other emission units within the facility. The use of such "netting credits" in CAA permitting is subject to numerous requirements and restrictions, most of which are beyond the scope of this Motion to Enter. In general, where allowable, the use of emissions reductions or "netting credits" in this way is sometimes called "netting out." A project that nets out of major NSR permitting may be required to obtain a "minor" NSR permitt (as compared to what is required for a "major" NSR permit). 40 C.F.R. § 52.21

Specifically, Paragraph 6 of the proposed amendment, which would add new Paragraph 99A to the Consent Decree, extends the currently-applicable requirements of the Consent Decree's Paragraph 99 for refinery-related units (requiring application of newly-promulgated NSPS for sulfur recovery plants at 40 C.F.R. Part 60, Subpart Ja, and adding a new hydrogen sulfide limit for refinery flaring devices) to any emission unit. In addition, new Paragraph 99A would require that if emission credits generated at the Marcus Hook Refinery are used at any other emission units at the Philadelphia Refinery Property, those emission units must use stringent BACT, BAT, or LAER controls, as applicable. In this way, even if credits are sufficient to offset emission increases and the project is able to "net out" of the major NSR permitting process at the Philadelphia Refinery, these credits cannot be used to "net out" of stringent controls that would otherwise be required for "major" projects under NSR.

The proposed amendment would also provide an additional backstop to ensure that the appropriate level of pollution control is required at the Philadelphia Refinery Property. Specifically, new Paragraph 99A of the Consent Decree would provide that where the permitting authorities determine that the Philadelphia and Marcus Hook operations are to be permitted as a single "facility" under Pa. Code Title 25 § 121.1 and 40 C.F.R. § 52.21(b)(5), the total amount of emission reduction credits that could be used at the Philadelphia Refinery Property generated by the shut-down of Marcus Hook Refinery would be limited.

The proposed amendment goes beyond the requirements of any federal, state, and local law for a single source by precluding the circumstance the Commenter raises as a concern, and would *not* allow the Philadelphia Refinery to increase emissions beyond what it could otherwise do prior to triggering compliance with NSR in the event of a single source determination by

PADEP and/or AMS. Absent the proposed amendment, and assuming that the Pennsylvania single source determination would still stand, the Philadelphia Refinery would have access to any credits found to have been generated by the shutdown of Marcus Hook process units. Those credits could be used under the NSR rules to allow emissions increases at Philadelphia Refinery process units, regardless of the level of controls installed at those units. The proposed amendment would preclude this by requiring a level of controls on those units that comports with major NSR requirements. It would also specify limits on any credit generation from the shutdown of Decree-covered process units so as to ensure that credits are not claimed for emission reductions that would have been accomplished by installation of Decree-mandated controls. Finally, the proposed amendment restricts the use of the credits to only the Philadelphia and Marcus Hook Refineries; without the proposed amendment, those credits could be used for any project within the multi-county Philadelphia metropolitan area.[16] Thus, the restrictions contained in the proposed amendment will serve to protect air quality in the Philadelphia region.[17]

b. Fenceline Monitoring Project.

The proposed amendment also adds a new requirement for fenceline monitoring which is specifically designed to benefit the local citizens. Paragraphs 8 and 9 of the proposed amendment would require the installation of new emissions monitors at the refinery fenceline – one monitor "upwind" and a second one "downwind" – to monitor for a number of pollutants:

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[16] Without the proposed amendment, the NOx and VOC credits could be sold for use within the eighteen- county Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area. SO_2 and $PM_{2.5}$ credits could be used within the five-county Pennsylvania portion of the Philadelphia metropolitan area.

[17] It is noteworthy that new Paragraph 99A d. iii specifically requires defendants to adhere to all PSD regulations and NSR permitting requirements.

various fractions of PM, VOCs, hydrogen sulfide, SO_2 and sulfur compounds. The fenceline monitoring emission data will be made available to the public on a website and updated on a weekly basis. In addition to emission data from the fenceline monitors, the website will also provide the public with access to emission data from refinery emission units that are monitored using continuous emissions monitoring systems ("CEMS"), as well as access to CEMS data that is reported by the refinery pursuant to its Title V air permit. The United States received no adverse comments on this provision of the proposed amendment.

In sum, the United States carefully reviewed and considered the concerns embodied in the comment, and those concerns do not provide a basis for rejecting this proposed amendment or altering its terms. Those terms remain reasonable, adequate, and consistent with the Clean Air Act

V. CONCLUSION

The agreement now before the Court was reached after the parties' careful and informed assessment of the merits of the issues and the value of the environmental benefits that will accrue from PES R&M picking up where Sunoco leaves off in complying with injunctive measures. The resulting terms are fair, adequate and reasonable, and consistent with the goals of the Clean Air Act. Because the public comment submitted on the proposed amendment to the Decree does not provide a basis for the United States to withhold its consent to the settlement, the United States requests that this Court approve and enter the proposed Fourth Amendment to Consent Decree as a final judgment.

Respectfully submitted,

THE UNITED STATES OF AMERICA

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

//s// Michael J. McNulty
MICHAEL J. McNULTY
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 514-1210
Attorney-in-Charge for the United States

ZANE D. MEMEGER
United States Attorney
Eastern District of Pennsylvania

MARGARET L. HUTCHINSON
Assistant United States Attorney
616 Chestnut Street, Suite 1250
Philadelphia, Pennsylvania 19106

CERTIFICATE OF SERVICE

As per the Eastern District of Pennsylvania, Electronic Case Filing System, Attorney User Manual, Procedural Order Rule 7(a) & (b), I hereby certify that I caused a copy of the foregoing

UNITED STATES MOTION TO ENTER THE FOURTH AMENDMENT TO CONSENT DECREE

and

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO ENTER THE FOURTH AMENDMENT TO CONSENT DECREE

to be served upon the parties and their counsel identified on the list below via Federal Express, Priority Delivery or USPS First Class Priority, postage pre-paid, and/or direct Electronic Notification to those recipients having consented to electronic service.

February 22, 2013

//s// Michael J. McNulty

MICHAEL J. McNULTY
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1210
michael.mcnulty@usdoj.gov

SERVICE LIST

*Indicates Party to Action

PLAINTIFF INTERVENORS

THE COMMONWEALTH OF PENNSYLVANIA*

JAMES D. REBARCHAK
REGIONAL MANAGER
AIR QUALITY
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
2 EAST MAIN STREET
NORRISTOWN, PA 19401-4915

DOUGLAS G. WHITE
SUPERVISORY COUNSEL
SOUTHEAST REGIONAL OFFICE
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
2 EAST MAIN STREET
NORRISTOWN, PA 19401
T: 484.250.5816
douwhite@state.pa.us

CITY OF PHILADELPHIA*

DENNIS YUEN
ASSISTANT CITY SOLICITOR

PATRICK K. O'NEILL
DIVISIONAL DEPUTY CITY SOLICITOR, ENVIRONMENTAL LAW
CITY OF PHILADELPHIA LAW DEPT.
ONE PARKWAY BLDG. 16TH FLOOR
1515 ARCH STREET
PHILADELPHIA, PA 19102
T: 215.683.5172
patrick.o'neill@phila.gov

THOMAS HUYNH
DIRECTOR
AIR MANAGEMENT SERVICES
321 UNIVERSITY AVENUE, SECOND FLOOR
PHILADELPHIA, PA 19104
T: 215.685.7585
Thomas.Huynh@phila.gov

DEFENDANTS

SUNOCO, INC. *

ROBERT W. OWENS
PRESIDENT AND CEO
SUNOCO, Inc. (R&M)
1818 MARKET STREET
PHILADELPHIA, PA 19103
rowens@sunocoinc.com

ARNOLD D. DODDERER
GENERAL COUNSEL (ACTING)
SUNOCO, INC. (R&M)
1735 MARKET STREET
PHILADELPHIA. PA 19103
addodderer@sunocoinc.com

PES R&M LLC*

JOHN McSHANE
GENERAL COUNSEL
PHILADELPHIA ENERGY SOLUTIONS
REFINING & MARKETING LLC
1735 MARKET STREET
10TH FLOOR
PHILADELPHIA, PA 19103
john.mcshane@pes-companies.com

LISA RUNYON
ASSISTANT GENERAL COUNSEL
PHILADELPHIA ENERGY SOLUTIONS
REFINING & MARKETING LLC
1735 MARKET STREET
10TH FLOOR
PHILADELPHIA, PA 19103
Lisa.runyon@pes-companies.com

COMMENTER

SPARSH KHANDESHI

ENVIRONMENTAL INTEGRITY PROJECT
1 THOMAS CIRCLE, SUITE 900
WASHINGTON, DC 20005
skhandeshi@environmentalintegrity.org
202-263-4446